NO. 80498-2

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF: DAVID T. FAIR

STATE OF WASHINGTON, Respondent,

vs.

DAVID T. FAIR, Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

James L. Reese, III
WSBA #7806
Attorney for Petitioner

612 Sidney Avenue
Port Orchard, WA 98366
(360)876-1028

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I. STATEMENT OF ISSUES

1. A petition seeking Mr. Fair's civil commitment was filed just prior to his release from incarceration while serving a non-sexually violent sentence. Whether the due process clauses of Wash. Const. art. I, sec. 3 and the Fifth and Fourteenth Amendments of the United States Constitution require the State to allege and to prove a recent, overt act (ROA)[1] of sexual violence during the period of time that Mr. Fair was living in the community, before the State may be allowed to obtain an Order of Civil Commitment?

2. Petitioner was sentenced to 20 months confinement on June 25, 1992, when his SOSSA sentence was revoked based on a conviction in 1988 for Child Molestation in the Second degree. This sentence was ordered to run concurrent with a conviction for Robbery in the First Degree entered on June 10, 1992- where petitioner was sentenced to 87 months in prison- and was served by August 30, 2000. Whether the trial court erred when it entered Findings of Fact 8:

> "On June 28, 2004, Respondent was due to be released from confinement for the concurrent sentences he was serving under Kitsap County cause numbers 90-1-00498-6 and 88-1-00362-7."

3. Whether the Petitioner was denied Due Process of Law contrary to the Wash.

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[1] RCW 71.09.020(10) provides: "Recent overt act" means any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act. (former RCW 71.09.020(5)).

Const. Art. I, sec. 3 and to the Fifth and Fourteenth Amendments when the Court of Appeals affirmed entry of the trial court's Conclusion of Law No. 7- where no "recent overt act" was alleged or proved:

> "The evidence presented at Respondent's trial proved beyond a reasonable doubt that Respondent is a sexually violent predator as that term is used in chapter RCW 71.09."[2]

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Mr. Fair's adult criminal history consists of a February 15, 1989 sentence for Second Degree Child Molestation alleged to have occurred on July 23, 1988. CP 69; ex. A. Fair served 137 days in confinement before sentencing. He was granted a Special Sex Offender Sentencing Alternative (SOSSA), placed on work release and then released to the community; only after his conviction was finalized.

On November 10, 1989 he committed an alleged First Degree Robbery charge in Kitsap County. CP 89; ex. E. After absconding to New Mexico and within the next five days he committed the crimes of Receiving a Stolen Vehicle or Motor Vehicle, two counts of Receiving Stolen Property, one count of Great

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[2]RCW 71.09.020(16) states: "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory act of sexual violence if not confined in a secure facility.

Bodily Injury by Vehicle, when he tried to run a roadblock. By November 15, 1989 he began his current period of incarceration in New Mexico. CP 81; ex. C.

The New Mexico sentence totaled 90 months or 7 ½ years. He was then returned to Washington state and eventually sentenced for the 1989 Kitsap County Robbery on June 10, 1992. He was given an 87 month sentence, consecutive to the New Mexico sentence. CP 93; ex. E. His release date was June 28, 2004 for the robbery charge. CP 47, 53-6.

Then, on June 25, 1992 an order was entered revoking his second degree child molestation suspended sentence because he violated the terms of his community placement.[3] He was sentenced to a term of 20 months concurrent with the Kitsap County robbery conviction and given credit for 137 days previously served. His release date for this charge was August 30, 2000. CP 47, 53-6.[4]

Mr. Fair was scheduled to be released from prison on June 28, 2004. CP 435. On June 23, 2004 the State filed a petition to commit Mr. Fair as a Sexual Violent Predator (SVP). He waived his right to a jury trial. The Kitsap County

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[3] According to the Order Revoking Suspension of Sentence Fair 1) failed to continue with treatment, 2) failed to report to Department of Corrections, 3) failed to pay his legal obligations, 4) failed to notify of change of address and employment and 5) had subsequent law violations leading to convictions. CP 104, ex. F.

[4] Mr. Fair's release date was August 30, 2000. CP 47. His counselor/cco's notation on a Department of Corrections form date November 30, 2000 stated: "This conviction has expired and was running concurrent with current conviction (Both J&S attached) 90-1-00498-6." CP 54.

Superior court found beyond a reasonable doubt that the petition filed by the State should be granted. CP 414, 427-28. On January 5, 2006 an Order of Commitment was filed. CP 422. The petitioner appealed on January 13, 2006. CP 424. The Court of Appeals for Division II affirmed his commitment to the Special Commitment Center as an (SVP). *In re Detention of Fair*, 139 Wn.App. 532, 161 P.3d 466 (2007). On April 2, 2008 the Petition for Review was granted.

B. ARGUMENT IN THE TRIAL COURT

Prior to trial on July 29, 2005 the defendant filed and argued a motion to dismiss. CP 29; VI RP 1. The defense argued that based on *In re the Detention of Albrecht*, 147 Wn.2d 1, 51 P.3d 73 (2002) the state has to prove "current dangerousness." *id.* at 7. The defense argued: "You have to say if you're out in the community and don't do anything bad, they have to show that you're currently dangerous." VI RP 2. It was stated in Mr. Fair's motion: "Thus, the Petition filed on June 25, 2004, predated Mr. Fair's release date on the Robbery conviction (June 28, 2004) but postdated his release date for the sexually violent offense (August 30, 2000). Moreover, as noted, the Petition does not address the time Mr. Fair spent in the community on community custody pursuant to the SOSSA sentence." CP 47.

The defense further argued orally to the trial court:

> "It's our position you have to be incarcerated for the sexually violent offense and there cannot be any period of release to the community in between the two, and

> that's the real bottom line of this issue. If you're out in the community, you don't do anything – he did something bad, he committed a robbery. If you don't do anything sexually bad, sexually violent offense, that the state should have to prove or be put to prove overt act. The Albrecht case is I think abundantly clear that Mr. Fair should require that." VI RP 4.

Mr. Cross argued: "That recent, overt act, entire phrase, has to apply to the last time a person was in the community, or doesn't make any sense." VI RP 14. The defense's argument was that release into the community, without sexual re-offense, would negate proof of a recent, overt act. RP 5.

C. COURT OF APPEALS' HOLDING

The Court of Appeals rejected Mr. Fair's assertions and affirmed the trial court on July 3, 2007. Essentially, the Court of Appeals relied on *In re Detention of Henrickson*, 140 Wn.2d 686, 2 P.3d 473 (2000)[5] and on *In re the Matter of Kelley*, 133 Wn.App. 289, 135 P.3d 554 (2006), *review denied*, 159 Wn.2d 1019 (2007).[6] The appellate court held that due process does not require proof of a

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[5]Henrickson plead guilty to statutory rape of a 4 year old in 1986. He was released in 1989. The following year he abducted a six year old and was convicted of attempted kidnaping and communication with a minor for immoral purposes. Pending his appeal he was free on bail for three and one half years. Before his release in 1996 the state field a petition to have him committed as an SVP.

Halgren was a consolidated case. He had been released into the community for three months pending sentencing for unlawful imprisonment of a prostitute, a sexually violent offense. He was in confinement when his 60 month exceptional sentence was reversed and when the state moved to commit him as an SVP.

[6]Kelley was convicted of raping a 12 year old girl in 1972. In 1980 he was convicted of statutory rape first degree of a 9 year old female. He then received a

ROA "when, on the day the petition is filed, an individual is incarcerated for a sexually violent offense." *In re Henrickson,* at 689.

With regard to Fair's argument that he was not incarcerated or serving time in prison when the State filed its SVP for the sexual offense but only for the robbery conviction, the Court of Appeals ruled:

> "While Fair correctly points out that, unlike *Hendrickson*, Fair's sentence for the sexual offense had expired before the State filed its SVP petition, this difference is not relevant. Fair was in continuous confinement from the time he returned to prison on the second degree child molestation conviction until his scheduled release date on the first degree robbery conviction. He was not released into the community between the incarceration for the sexually violent offense and the robbery sentence and, thus, he had no opportunity to commit a ROA in the community. Requiring proof of a ROA under these circumstances would be absurd. *See Hendrickson*, 140 Wn.2d at 695."

In re Detention of Fair, 139 Wn.App. at 541.

III. SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

The standard of review for the main issues is de novo review. According to *Rettkowski v. Department of Ecology*, 128 Wn.2d 508, 515, 910 P.2d 462 (1996) interpretation of a statute is a question of law and subject to de novo

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20 year suspended sentence and was allowed to leave Western State for brief periods. He assaulted his girl friend and possessed a bayonet during one leave. As a result the suspended sentence for rape was revoked in 1983. The state filed a petition to involuntarily commit Kelley as a SVP prior to his release as he was finishing his sentence. The Court of Appeals held no recent overt act was required because he was incarcerated at the time for a sexually violent offense.

review. Accord, *In re Detention of Williams,* 147 Wn.2d 476, 486, 55 P.3d 597 (2002). Therefore, this Court is not bound by the decision of the Court of Appeals. Rather this court may independently examine the alleged errors in this appeal.

In sum, the State should be required to allege and to prove a ROA because Mr. Fair had been released from total confinement of 137 days into the community in 1989. Also, at the time the petition was filed in 2004, Mr. Fair was not incarcerated on a charge that constituted a ROA. He had already served his prison time for the sexually violent offense of child molestation in the second degree by August 20, 2000.

IV. ARGUMENT

A. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION TO DISMISS BASED ON FAILURE TO PROVE A RECENT OVERT ACT.

According to *In re Detention of Albrecht:*

> "A sexually violent predator petition can now be filed against "a person who at any time previously has been convicted of a sexually violent offense and *has since been released from total confinement"* only where he or she has committed a recent overt act. RCW 71.09.030(5) (emphasis added)...."

147 Wn.2d at 8.

Albrecht was cited and discussed in *In re Detention of* Lewis, __Wn.2d ___, 177 P.3d 708, 714 (2008). This Court stated *In re Detention of Lewis*:

> "Thus, the court concluded that the State must plead

> and prove a recent overt act where an offender "(1)... has been released from confinement (2) but is incarcerated the day the petition is filed (3) on a charge that does not constitute a recent overt act."

Lewis, at 177 P.3d at 714 (quoting and citing *Albrecht* at 11 n. 11, 51 P.3d 73). Here, Mr. Fair had been released from confinement for a sexually violent offense for over a 9 month period during 1989. And he was not held on a ROA charge on June 23, 2004. Therefore, the state must plead and prove a ROA.

The criteria in *Albrecht* and in *Lewis* was the requirement or qualification of whether the alleged SVP had been released into the community but was incarcerated on the date the petition was filed. Mr. Fair meets this criteria. He was in total confinement for the charge of child molestation in the second degree from approximately September 1988- for 137 days -until February 15, 1989 before he was sentenced to a SSOSA sentence. He was then in the community for approximately 9 months when he committed robbery in November 1989 and absconded to New Mexico where he was arrested later that month. He has been in total confinement[7] ever since.

Justice Sander's stated in part in his dissenting opinion in *In re Detention of Henrickson*, 140 Wn.2d at 711-12:

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[7]RCW 9.94A.030(47) "Total confinement" means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and RCW 72.64.060. (Former RCW 9.94A.030(35)).

> "Washington courts have previously held "in considering whether an overt act, evidencing dangerousness, satisfies the recentness requirement, it is appropriate to consider the time span in the context of all the surrounding relevant circumstances. *In re Detention of Pugh*, 68 Wn. App. 687, 695, 845 P.2d 1034 (1993). If an individual has spent time in the community following his most recent sex offense, at minimum, due process and the statute require the State to prove an overt act during that period of release before the individual may be committed for the rest of his life. If he truly is a sex predator, an overt act during this most recent period of release will be there. But if it is not there, the State's proof fails to cross the most minimal threshold of reliability which our constitutional process requires because, in theory, a sex predator is one who will inevitably reoffend and be unable to volitionally control his supposed predisposition. FN And we are imprisoning men outside the criminal process who do not meet the statutory criteria for "civil" imprisonment..." (footnote omitted).

While in the community during 1989, after being incarcerated for a violent sexual offense, Mr. Fair did not commit a recent overt act.

RCW 71.09.030 states in part:

> "When it appears that: (1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement... or (5) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act; and it appears that the person may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating

sufficient facts to support such allegation."

The facts of the David Fair situation reveal the unlimited authorization the State has to arbitrarily seek a civil commitment against any inmate who has previously been convicted of a sexually violent offense. David Fair received a Special Sex Offender Sentencing Alternative sentence in 1989. CP 69, 434. In June 1992 his suspended 20 month sentence was later revoked, in part, because he had served 7 ½ years in New Mexico for non-sexual offenses. CP 81. He was also sentenced to 87 months for a Washington first-degree robbery offense to be served concurrently. CP 94, 107, 435. He was scheduled to be released on June 28, 2004 after serving 19 ½ years in prison when this state sought to commit him as a Sexually Violent Predator on June 23, 2004. CP 436.

Testimony

The state hired an expert who was employed part time by the State of Wisconsin. III RP 200. Dr. Dennis Doren was a psychologist who had assessed over 200 cases involving sex offenders and civil commitment proceedings. III RP 204. He had been doing sexually violent predator evaluations in the state of Washington since 1999. The Kitsap County Superior Court adopted nearly all of Dr. Doren's findings that Mr. Fair was more likely than not to re-offend in a sexually violent manner if not confined in a secure facility. CP 442-3, ff. 53. This was to the exclusion of Mr. Fair's expert witness, Theodore Donaldson, a clinical psychologist from California who at the time of trial had performed 367

evaluations on 244 alleged sexually violent predators. II RP 73. Dr. Doren concluded that Mr. Fair did not suffer from mental abnormality or personality disorder, as Dr Doren postulated. II RP 76; II RP 246-7.

The state sought to avoid having to prove a ROA because Mr. Fair was incarcerated on the date the civil commitment proceedings were filed in 2004. But, this was in disregard of the fact that Fair had long since served his 20 month sexual offense sentence by early 1994.[8] The basis of the state's evidence to support civil commitment were self-reporting fantasies by Fair over the next 10 years.

The underlying basis for committing Mr. Fair was based on his self-reporting of sexual fantasies about minors. Lisa Dandesku was Mr. Fair's treatment provider at the Department of Corrections Sexual Offender Treatment Program (SOTP) for a fourteen month period beginning in January 2003. CP 436. Fair completed the one year program in March 2004. I RP 37. It was during this time that most of the damaging information about Mr. Fair's past sexual history - which Mr. Fair has admitted he made up-was disclosed i.e. sexual contact with 19 individuals, including 17 child victims with ages ranging from 2 to 17 years old.

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[8] Fair had served 4 and a half months on the child molestation conviction. (See 1989 Judgment and Sentence for Second Degree child Molestation: "The defendant has served 137 days in confinement before sentencing and said confinement was solely in regard to the offense(s) for which the defendant is now being sentenced.") CP 70.

I RP 41; CP 436, ff 11.

By comparison, Fair testified that when he was transferred to the Twin Rivers Facility he portrayed himself as a sex offender in order to be safe from the general prison population. V RP 473. According to Dr. Donaldson's testimony: "He told me at one point he was at Twin Rivers and he "...described all kinds of bizarre dreams and violence and sex and so forth because he wanted to convince her [therapist] he wanted to stay in treatment." II RP 90.

Precedent

Clearly, Mr. Fair is being imprisoned outside the criminal process and the state has been relieved of proving a recent overt act. This court should follow the reasoning as set forth in *In re Detention of Albrecht*, supra, 147 Wn. 2d 7. In *Albrecht,* this court ruled that the State is only relieved of proving a "recent overt act" if the defendant is, at the time the petition is filed, serving the original sentence imposed upon conviction for the predicate offense. *Id.* at 10-11. Fair was serving time for Robbery in the First Degree when the State filed its petition. CP 435-36.[9] This rule is steadfast and was unambiguously stated in *In re Detention of Henrickson:*

"We hold no proof of a recent overt act is constitutionally

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[9] The trial court resolved this issue by finding: "On June 28, 2004, Respondent was due to be released from confinement for the concurrent sentences he was serving under Kitsap County cause numbers 90-1-00498-6 and 88-1-00362-7." CP 435-6, ff. 8.

> or statutorily required when, on the day the petition is filed, an individual is incarcerated for a sexually violent offense, RCW 71.09.020(6), or any act that by itself would have qualified as a recent overt act, RCW 71.09.020(5)."

140 Wn.2d 686, 689, 2 P.3d 473 (2000) (quoted in part in *In re Detention of Broten*, 115 Wn.App. 252, 255, 62 P.3d 514, *review denied,* 150 Wn.2d 1010 (2003)). Mr. Fair was not incarcerated for a sexually violent offense or for a recent overt act on the day the petition was filed on June 25, 2004 nor on the date of trial on October 24, 2005. CP 1. Therefore, the State should be required to prove a ROA. (accord: *In re Detention of Broten,* 115 Wn. App. at 257 where appellant was released on child rape conviction but placed back into total confinement for violating conditions of community custody).

One of the tests used to prove a ROA is whether the defendant committed a sexually violent offense[10] during the time that he was released into the community. Mr. Fair passed this test. Although he committed crimes in two states, he did not commit a sexually violent offense during his release from 137 days in custody in 1989.[11]

The argument still remains that if the State was or is unable to prove a recent overt act because of its delay in bringing civil commitment proceedings

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[10]RCW 71.09.020(15) defines a sexually violent offense. (See appendix).

[11] In addition to the Washington Robbery conviction the New Mexico crimes were Receiving a Stolen Vehicle, Receiving Stolen Property (2 counts) and Great Bodily Injury by Vehicle. CP 435, ff. 4.

at an earlier date, how did Mr. Fair become a SVP while he was continually incarcerated, except for his brief release on SOSSA during 1989?

Finally, it was stated in *Albrecht*: "After the offender has been released into the community, proof of a recent overt act is no longer an impossible burden for the State to meet." id. at 10.

B. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED ENTRY OF FINDING OF FACT EIGHT BECAUSE MR. FAIR WAS NOT IN CONFINEMENT FOR A SEXUALLY VIOLENT OFFENSE.

Finding of Fact 8 states that Mr. Fair's release date from total confinement was on June 28, 2004:

> "8. On June 28, 2004, Respondent was due to be released from confinement for the concurrent sentences he was serving under Kitsap County cause numbers 90-1-00498 and 88-1-00362-7."

CP 435. Mr. Fair's release date for his only sexual violent offense of child molestation in the second degree was August 30, 2000. CP 47. At the time the state filed the petition for civil commitment on June 23, 2004 he was only serving the remaining sentence for the robbery in the first degree conviction. CP 90.

According to *State v. Thetford*, 109 Wn.2d 392,396, 745 P.2d 496 (1987): "...a trial court's findings of fact will be upheld on appeal so long as they are supported by substantial evidence." See also, *State v. Hill*, 123 Wn.2d 641,644, 870 P.2d 313 (1994): Substantial evidence is enough evidence to persuade a fair-minded, rational person of the truth of the finding.

The Court of Appeals acknowledged this issue but ruled without citation

to any authority except to the rule of *Henrickson.*[12] That ruling does not match the situation in the case at bench. The Court of Appeals held:

> "We conclude that the expiration of one sentence, without an intervening release to the community, does not prevent the State from filing a SVP petition while a defendant is still incarcerated, so long as one of the offenses leading to the incarceration meets the definition of RCW 71.09.020(15)[sexually violent offense] or RCW 71.09.020(10) [recent overt act]." (footnotes omitted).

In re Detention of Fair, 139 Wn. App. at 542.

This court should consider the total circumstances of this case. See generally, *In re Detention of Pugh*, 68 Wn.App. at 695. It was between August 2000 and June 23, 2004 that Fair self reported sexual deviancy and portrayed himself as a sex offender in order to remain out of the general prison population because of his conviction for child molestation. V RP 474-78.

It was during this treatment in SOTP that Fair reported sexual arousal and of masturbating to thoughts of minor girls mostly. He accompanied this with pictures of clothed minor females as young as 7 or 8 years old from magazines. I RP 48. Ms. Dandesku testified that Mr. Fair "did not want to stop masturbating to minors." I RP 48. She wrote a treatment summary during May 2004. CP 436, ff.

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[12]This court held that due process does not require the State to prove a recent overt act "[w]hen, on the day a sexually violent predator petition is filed, an individual is incarcerated for a sexually violent offense, RCW 71.09.020(15), or for an act that would itself qualify as a recent overt act, RCW 71.09.020[10]." *In re Detention of Marshall*, 156 Wn.2d 150, 157, 115 P.3d 111 (2005) (quoting *Henrickson*,140 Wn.2d at 695 and citing *Albrecht*, 147 Wn.2d at 8).

11; appendix to Petition for Review. Coincidentally, Dr. Doren met with Mr. Fair on May 24, 2004 and conducted his 4.25 hour interview. CP 437, ff. 15.

These self-reports and unverified disclosures precipitated the filing of civil commitment proceedings in 2004. This was four years after Mr. Fair had long served his sentence for Child Molestation in the second degree.

C. THE COURT OF APPEALS ERRED WHEN IT FOUND THERE WAS SUFFICIENT EVIDENCE TO SUPPORT CONCLUSION OF LAW NO. 7 WHERE NO "RECENT OVERT ACT" WAS SHOWN.

The state asserted and the Court of Appeals agreed, that the State did not have to prove a recent overt act on the date it filed its civil commitment petition because Mr. Fair was about to be released from total confinement and had been previously convicted of a sexually violent offense. That offense was not recent and had been committed as long ago as July 1988. CP 69, ex. A. However, the state was also relieved from having to overcome the constitutional due process requirement of "Proof of current dangerousness." *In re Turay*, 150 Wn.2d 71, 74 P.3d 1194 (2003); *In re Personal Restraint Petition of Young,* 122 Wn.2d 1, 26, 857 P.2d 989 (1993).

The trial court entered Conclusion of Law 7 which states:

> "The evidence presented at Respondent's trial proved beyond a reasonable doubt that Respondent is a sexually violent predator as that term is used in chapter RCW 71.09."

CP 447.

If there is substantial evidence, then appellate review determines whether the findings support the conclusions of law and judgment. *Tacoma v. State*, 117 Wn.2d 348,361, 816 P.2d 7 (1991). Appellate courts review issues of law de novo. *State v. Johnson*, 128 Wn.2d 431,443, 909 P.2d 293 (1996) (citing *State v. Ford*, 125 Wn.2d 919,923, 891 P.2d 712 (1995)). Therefore, this Court is not bound by the trial court's conclusions of law and may independently examine whether the trial court's findings suppport its conclusions of law regarding constitutional challenges.

There was no explicit finding of fact or conclusion of law that determined Fair to be currently dangerous to the extent that he could not control his behavior. RCW 71.09.020(16) defines a sexually violent predator, in part, as: "any person... who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility."

According to *Albrecht,* 147 Wn.2d at 7:

> " However, a narrowly tailored statute must require that an individual be both mentally ill [fn] and dangerous for civil commitment to satisfy due process." (Footnote omitted).

(citing *Addington v. Texas*, 441 U.S. 418, 426, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) and *Foucha v. Louisiana,* 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992); *Allen v. Illinois*, 478 U.S. 364, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986) (accord and cited, *In re Pers. Restraint of* Young, 122 Wn.2d at 32: "there

is no doubt that commitment [of SVP"s] is predicated on dangerousness under the Statute.")).

See also, *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 2080, 138 L.Ed.2d 501 (1997):

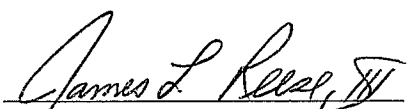
> "A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with proof of some additional factor, such as "mental illness" or "mental abnormality.""

V. CONCLUSION

This court should reverse the Kitsap County Superior Court ruling that the State proved beyond a reasonable doubt that Mr. Fair was a sexually violent predator and reverse the Court of Appeals decision that affirmed entry of the civil commitment order.

Dated this 30th day of May 2008.

Respectfully submitted,



James L. Reese, III
WSBA #7806
Court Appointed Attorney
For Petitioner

RCW 71.09.020
Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Department" means the department of social and health services.

(2) "Health care facility" means any hospital, hospice care center, licensed or certified health care facility, health maintenance organization regulated under chapter 48.46 RCW, federally qualified health maintenance organization, federally approved renal dialysis center or facility, or federally approved blood bank.

(3) "Health care practitioner" means an individual or firm licensed or certified to engage actively in a regulated health profession.

(4) "Health care services" means those services provided by health professionals licensed pursuant to RCW 18.120.020(4).

(5) "Health profession" means those licensed or regulated professions set forth in RCW 18.120.020(4).

(6) "Less restrictive alternative" means court-ordered treatment in a setting less restrictive than total confinement which satisfies the conditions set forth in RCW 71.09.092. A less restrictive alternative may not include placement in the community protection program as pursuant to RCW 71A.12.230.

(7) "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.

(8) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(9) "Predatory" means acts directed towards: (a) Strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists.

(10) "Recent overt act" means any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.

(11) "Risk potential activity" or "risk potential facility" means an activity or facility that provides a higher incidence of risk to the public from persons conditionally released from the special commitment center. Risk potential activities and facilities include: Public and private schools, school bus stops, licensed day care and licensed preschool facilities, public parks, publicly dedicated trails, sports fields, playgrounds, recreational and community centers, churches, synagogues, temples, mosques, public libraries, public and private youth camps, and others identified by the department following the hearings on a potential site required in RCW 71.09.315. For purposes of this chapter, "school bus stops" does not include bus stops established primarily for public transit.

(12) "Secretary" means the secretary of social and health services or the secretary's designee.

(13) "Secure facility" means a residential facility for persons civilly confined under the provisions of this chapter that includes security measures sufficient to protect the community. Such facilities include total confinement facilities, secure community transition facilities, and any residence used as a court-ordered placement under RCW 71.09.096.

(14) "Secure community transition facility" means a residential facility for persons civilly committed and conditionally released to a less restrictive alternative under this chapter. A secure community transition facility has supervision and security, and either provides or ensures the provision of sex offender treatment services. Secure community transition facilities include but are not limited to the facility established pursuant to RCW 71.09.250(1)(a)(i) and any community-based facilities established under this chapter and operated by the secretary or under contract with the secretary.

(15) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as

defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

(16) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

(17) "Total confinement facility" means a secure facility that provides supervision and sex offender treatment services in a total confinement setting. Total confinement facilities include the special commitment center and any similar facility designated as a total confinement facility by the secretary.

[2006 c 303 § 10. Prior: 2003 c 216 § 2; 2003 c 50 § 1; 2002 c 68 § 4; 2002 c 58 § 2; 2001 2nd sp.s. c 12 § 102; 2001 c 286 § 4; 1995 c 216 § 1; 1992 c 145 § 17; 1990 1st ex.s. c 12 § 2; 1990 c 3 § 1002.]

Notes:

Severability -- Effective date -- 2003 c 216: See notes following RCW 71.09.300.

Application -- 2003 c 50: "This act applies prospectively only and not retroactively and does not apply to development regulations adopted or amended prior to April 17, 2003." [2003 c 50 § 3.]

Effective date -- 2003 c 50: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 17, 2003]." [2003 c 50 § 4.]

Purpose -- Severability -- Effective date -- 2002 c 68: See notes following RCW 36.70A.200.

Effective date -- 2002 c 58: See note following RCW 71.09.085.

Intent -- Severability -- Effective dates -- 2001 2nd sp.s. c 12: See notes following RCW 71.09.250.

Recommendations -- Application -- Effective date -- 2001 c 286: See notes following RCW 71.09.015.

Effective date -- 1990 1st ex.s. c 12: See note following RCW 13.40.020.

PROOF OF SERV ICE

STATE OF WASHINGTON)
COUNTY OF KITSAP)

James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

That on the 30th day of May, 2008, he deposited in the mails of the United States of America, postage prepaid, the original and one(1) copy of Supplemental Brief of Petitioner in In re the Detention of: David T. Fair, No. 80498-2 addressed to the office of Ronald R. Carpenter, Clerk, Supreme Court, Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929, mailed one (1) copy of the same to Todd Richard Bowers, Attorney General's Office, Criminal Justice Division, 800 5th Avenue, Ste. 2000, Seattle, WA 98104-3188 and mailed one (1) copy of the same to Petitioner, David T. Fair, at his last known address: David T. Fair,Special Commitment Center, P.O. Box 88600, Steilacoom, WA 98388.

James L. Reese, III

Signed and Attested to before me this 30th day of May, 2008 by James L. Reese, III.

Julia L. Reese

Notary Public in and for the State of Washington residing at Port Orchard.
My Appointment Expires: 4/4/09